No. 77.
Brf. of Chaplin as Amicus Cur

Office Supreme Court
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Filed Oct. 25, 1902.

No. 77.

WILLIAM R. HALE, AS RECEIVER FOR THE COLLECTION AND ENFORCEMENT OF THE LIABILITY OF STOCKHOLDERS OF THE NORTHWESTERN GUARANTY LOAN COMPANY (A CORPORATION),

Petitioner,

vs.

EDWARD P. ALLISON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF

SUBMITTED, BY LEAVE OF COURT, BY

HEMAN W. CHAPLIN,

as *Amicus Curiae*,

IN SUPPORT OF PROPOSITIONS ADVERSE TO THOSE OF THE PRESENT PETITIONER.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 77.

WILLIAM E. HALE, AS RECEIVER FOR THE COLLECTION AND ENFORCEMENT OF THE LIABILITY OF STOCKHOLDERS OF THE NORTHWESTERN GUARANTY LOAN COMPANY, (A CORPORATION), PETITIONER

vs.

EDWARD P. ALLINSON, ET AL.

Brief Submitted, by leave of Court, by

HEMAN W. CHAPLIN,

as amicus curiæ.

STATEMENT.

NATURE OF THE PRESENT SUIT.

The question before this Court is the propriety of a decree of a Circuit Court (affirmed by a Circuit Court of Appeals,) sustaining the demurrers to a bill in equity, and dismissing the bill.

The bill seeks to enforce severally against a large number of defendants ever resident in Pennsylvania, and not served with process in the Minnesota suits which led up to this suit, a stockholder's liability alleged to exist by the Constitution and laws of Minnesota.

The bill alleges the creation of the corporation—The Northwestern Guaranty Loan Company—under the general laws of Minnesota, in 1884, for dealing in and guaranteeing notes, mortgages, etc.

The bill further alleges that by the Constitution and General Laws of Minnesota the stockholders of the Loan Company (so the petitioner states the effect of those laws) assumed a personal contractual superadded liability equal to the par value of their stockholdings (Record, p. 8, V.), and that this liability was for the "equal and common benefit" of the corporate creditors (Record, p. 8, V.). The provisions of the Minnesota Constitution and Statutes upon this subject were as follows :

Minnesota Constitution, Article X., Sec. 3, (as amended November 5, 1872) :

> "Each stockholder in any corporation (except those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

General Statutes of 1894, Chapter 76 :

> "Sec. 5905. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.
>
> "Sec. 5906. The Court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.
>
> "Sec. 5907. If, on the coming in of the answer or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed, without appointing any receiver, to ascertain the respective liabilities of

such directors and stockholders, and enforce the same by its judgment, as in other cases.

"SEC. 5908. Upon a final judgment in any such action to restrain a corporation or against directors or stockholders, the court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof, to be made among its creditors.

"SEC. 5909. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"SEC. 5810. If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases.

"SEC. 5911. Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such an action, and from any distribution which shall be made under such judgment."

The bill in the present suit also alleges three distinct judicial proceedings in Minnesota—to wit: (*a*) an insolvency proceeding, (*b*) a common law action, (*c*) a suit in equity,—and the appointment, in two of those proceedings, respectively, of two Receivers (or so-called Receivers)—The Minneapolis Trust Company, and the present petitioner.

The record of one of those proceedings (the equity suit) is set forth in the bill; the facts as to the other two proceedings appear by the recitals in the record of the equity suit.

THE MINNESOTA PROCEEDINGS.

The three judicial proceedings and the Receivership (or so-called Receivership) appointments were as follows :

(a) The Insolvency Suit.

May 20, 1893, the Loan Company was adjudged insolvent, and the Minneapolis Trust Company was appointed Receiver of the assets *of the corporation* (Record, p. 8). A stockholders' liability not being an asset of the corporation (Record, p. 8, V.), the stockholders' liability now contended for did not pass to the Minneapolis Trust Company as Insolvency Receiver.

(b) The Common Law Suit of Kimball (Rogers, assignee) vs. Northwestern Guaranty Loan Company.

The L. Kimball Printing Company, at some time prior to November 1, 1893, recovered judgment at law against the Northwestern Guaranty Loan Company for costs in the sum of $46 (the amount being material to be mentioned for identification of this judgment in the various records), and assigned the judgment to one Rogers. Execution was returned unsatisfied (Record, p. 23).

(c) The Equity Suit (Rogers vs. Minneapolis Trust Co., Receiver, et al.).

About November 1, 1893 (about five months after the adjudication of insolvency), Rogers, as judgment creditor under said common law judgment then owned by him, filed a creditor's bill (Record, p. 8), and subsequently an amended bill (Record, p. 20), in behalf of

himself and all other creditors,—naming as defendants the Minneapolis Trust Company (as Insolvency Receiver of the Northwestern Guaranty Loan Co.) and all the stockholders of the Northwestern Guaranty Loan Company,—to enforce the stockholders' liability, and, to that end, for an accounting of the debts and assets of the corporation. Process was served upon the defendants resident in Minnesota, to wit: The Guaranty Loan Company, the Minneapolis Trust Company (Insolvency Receiver), and *about twenty stockholders resident in Minnesota* (Record, p. 9, VII.; Record, p. 42), but upon no non-resident stockholders; nor did any of those non-residents ever appear or take part (Record, p. 50, middle).

The amended bill, and the interlocutory decrees (including the so-called "final" decree in that suit), divided the defendants into two classes, residents and non-residents, and dealt with those classes separately (Bill, Record, p. 33; Decrees, Record, pp. 42, 50, 54, 86). The bill (Record, p. 33) alleged that the Court had no jurisdiction to render a personal judgment against the non-residents, and did not pray (Record, p. 34) for such a judgment, and the interlocutory and so-called "final" decrees dealt with them on this theory (Record, pp. 50, 54, 86).

The resident stockholders were about twenty in number (Record, pp. 42, 50, 86), and will hereafter be characterized as the "twenty resident stockholders."

After the filing of the bill an order was made by the Court (in pursuance of Gen. Stat., Minn., ch. 76, sect. 5911, quoted above) requiring due publication of notice to all creditors of the Northwestern Guaranty Loan Co. to exhibit their claims against the said company, and become parties to the suit of Rogers vs. Minneapolis Trust Co., Receiver, *et al.*, in which suit said order was made. The order further prescribed the method by which said creditors should become parties, and provided that in default of so becoming parties to said suit, such creditors should be debarred from all benefits under any judgment which should be rendered therein,

and from all share in any distribution which should be made under such judgment (Record, p. 42, 11 lines from bottom).

Under this order notice was duly published, and "about eight hundred" creditors of the Northwestern Guaranty Loan Co. intervened and filed their complaints as required by said order (Record, p. 43).

There were two interlocutory decrees—one filed March 27, 1896 (Record, pp. 42–51), and one dated February 8, 1897 (Record, pp. 51–78)—and a so-called "final" decree, dated November 3, 1897 (Record, pp. 84–87)). The second interlocutory decree repeats in part the first, and the so-called "final" decree repeats parts of both the interlocutory decrees. These decrees were as follows:

The First Interlocutory Decree.

That decree, after declaring, as findings of fact, the organization of the corporation; the adjudication of its insolvency, and the appointment (in the insolvency proceedings) of the Minneapolis Trust Company as Insolvency Receiver; the standing of Rogers, the plaintiff, as a judgment creditor (by reason of his common-law judgment above specified), and other preliminary matters of fact, found also as "*Findings of Fact*":

> That notice had been given to creditors, and that "about eight hundred" creditors had intervened and presented their claims, and that the [principal of] the indebtedness was "about" $2,543,689.29 (Record, p. 50, middle), but that the *exact* amounts had not as yet been ascertained;
>
> That the exact value of the assets in the hands of the Minnesota Trust Company, as Insolvency Receiver, had not as yet been ascertained;
>
> That the amount of the capital stock at par was $1,250,000.

That the body of stockholders, and their respective holdings, were as set forth in a schedule annexed (Record, pp, 46–50),—in which were included the present defendants.

That none of the defendants in that suit except those named in the decree as having been served with a summons (*i. e.*, the Guaranty Loan Company, the Minneapolis Trust Company, as Insolvency Receiver, and certain about twenty Minnesota stockholder defendants), had "been served" or "appeared," or "taken part in any of these proceedings," and that they were non-residents * * * "and have continued to be so since the commencement of the action."

As "*Conclusions of Law*," the decree declared and adjudged:

That the said about twenty Minnesota stockholder defendants, "*over whom*" (to quote from the decree) "*this Court* has jurisdiction," were "liable to the extent of the par value" of their several holdings, as reduced by the value of the corporation's assets, when that value should be ultimately ascertained (Record, p. 50.)

That the suit be continued for the purposes (Record, p. 51, tenth line), (*a*) of determining the *precise* amounts of indebtedness of the corporation; (*b*) of determining the value of the assets in the hands of the Minnesota Trust Company as Insolvency Receiver (there being as yet no other receiver); (*c*) of determining "the exact liability" *of* "said defendant stockholders * * * *served* in this action" (*i. e.*, the twenty Minnesota stockholders), and (*d*) for "other and further relief."

That (Record, p. 51, 15th line) a Receiver in the suit (that is, Rogers vs. Minneapolis Trust Company, Receiver, *et al.*), should be appointed "upon five days notice to the parties appearing in this action,"—such "parties" including the about eight hundred creditors (Record, p. 50, middle.)

The decree did not deal with non-resident stockholder defendants, except in said declaration of fact that they had not been served with process or taken any part in the case.

Proceedings Between the First and the Second Interlocutory Decrees.

After the first, and prior to the second, interlocutory decree, there took place,—as appears by the recitals in the second interlocutory decree (Record, p. 51, last en lines),—certain proceedings, as follows :

> E. A. Montgomery was appointed Referee to inquire into and classify and report upon the several claims of the creditors. He performed his duty, and filed a report.
>
> Thereupon, the cause came on for further hearing January 15, 1897 (Record, p. 51, at end), upon " application by the * * * plaintiff," and the creditors " for a final decree adjudging the amounts said plaintiff and intervenors are respectively entitled to recover against said Northwestern Guaranty Loan Company, and ascertaining and fixing the amount of the liability of the several stockholder defendants, *within the jurisdiction of*" the Court (that is the twenty Minnesota stockholder defendants) " and for judgment against each thereof "—(that is each *Minnesota stockholder defendant*)—" for the amount so ascertained," and for " further relief."

The Second Interlocutory Decree.

Shortly thereafter (Feb. 8, 1897, Record, p. 54, at end), was made the second interlocutory decree (Record, pp. 51–78), with " *Findings of Fact*," substantially as follows :

> That the allegations in the complaints of the intervening creditors were just.

That the [principal of the] indebtedness of the corporation aggregated $2,543,689.29, according to a schedule annexed in the decree (Record p. 52, II.; p. 55 *et seq.*) [That the sum named represented principal only, appears from Record, p 85, "Fifth."]

That the assets held by the Insolvency Receiver, —there being as yet no other Receiver,—amounted to $440,000 (Record, p. 52, III.).

That the par amount of outstanding stock was $1,250,000. That there was therefore an excess of corporate debts over corporate assets, not only equal to, but exceeding by $853,689, the total par amount of stock (Record, p. 52, IV.).

The Court adjudged as "*Conclusions of Law*" (Record, p. 53), as follows:

That there was due to the then plaintiff Rogers from the corporation $46 and interest, being the amount of his said common-law judgment.

That there were due to the several creditors from the corporation, various sums in principal and interest, according to a schedule annexed to the decree (Record, p. 53, "Second"; Record, p. 55, *et seq.*)

That Rogers, the then plaintiff, and the other creditors, who had come in, should recover the amounts of the stockholders' superadded liability *from the twenty Minnesota stockholders*,—all named in the decree (Record, p. 53, "Third"),—such liability of said Minnesota stockholder defendants footing up $70,200 (Record, p. 53, unadded column).

That William E. Hale, (the present Petitioner), be appointed Receiver in that suit; and be "authorized, empowered and directed to take any and all appropriate or necessary steps or proceedings for the purpose of collecting said judgments, and all or any thereof, and to hold the moneys and

funds so collected, subject to the further order of this court in the premises" (Record, p. 53, "Fourth").

That said Receiver be "directed, authorized and empowered to take any and all necessary or appropriate steps or proceedings against the non-resident stockholders of said defendant Northwestern Guaranty Loan Company, *against whom no personal judgment herein has been ordered*, for the enforcement and realization upon their stockholders' liability, and to that end said Receiver be and hereby is authorized, directed and empowered to institute and prosecute all such actions or proceedings in foreign jurisdictions, as may be necessary or appropriate to this end" (Record, p. 54, "Eighth").

"That this court retain jurisdiction of this cause until adjustment of all and several the rights and liabilities of the respective parties hereto" (Record, p. 54, "Ninth").

It is to be noted that this decree expressly denies, in the words italicized above, any attempt to render a judgment personally binding on the non-resident stockholders.

No non-resident stockholder defendant had up to that point been served with process, and none had appeared or taken part in the proceedings; nor did any such non-resident stockholder appear or take part up to the time of the so-called final decree.

The Third Decree (so-called "Final" Decree), dated November 3, 1897 (Record p. 84).

This decree merely followed and adjudged, with only slight differences in the arrangement or the language, the findings and conclusions of law of the first and second interlocutory decrees above set forth, and added nothing, either in legal effect or in language, to what was in those two prior decrees. Reference is

therefore here made to the detailed statements above, of the two interlocutory decrees (particularly of the second interlocutory decree), for a statement of the substance and legal effect of the so-called final decree.

It may be added that in the so-called final decree, it was ordered, "that this court retain jurisdiction of this cause until adjustment of all and several the rights and liabilities of the respective hereto" (Record, p. 87, "Fifteenth").

PROCEEDINGS IN THE PRESENT SUIT.

In the equity suit now before this Court, said William E. Hale, relying upon his appointment in the said Rogers equity suit in Minnesota as Receiver for the collection and enforcement of the liability of foreign stockholders, filed (with Rogers as joint plaintiff, who was subsequently withdrawn) a bill against a large number of Pennsylvania defendants, alleged to be stockholders, but not alleged to have been served with process in Minnesota. The several defendants demurred upon the grounds, among others, *(a)* that, inasmuch as they had not been served with process in the Rogers equity suit in Minnesota, the proceedings in that suit were in no way binding upon them, and there was, therefore, a fatal lack of parties in the present suit, to wit, of the National Guaranty Loan Company and the Minneapolis Trust Co. (insolvency Receiver), and all other stockholders and all creditors; *(b)* that the plaintiff had no standing in the Court or in any Court except the Courts of Minnesota; *(c)* that the remedy, if any, was at law, and *(d)* that the proceedings in Minnesota had no legal validity against these defendants, (as they were not served with process), and therefore could not be enforced against them in any form of proceeding. The Circuit Court sustained the demurrers and dismissed the bill without prejudice, resting its decision upon the ground that the remedy, if any, was at law; and the decree was "that the demurrer be sustained."

The Circuit Court of Appeals affirmed this decree, inclining to the opinion that the bills should have been dismissed for lack of standing of the Receiver, but adopting the said view of the Circuit Court.

ARGUMENT.

SCHEME OF ARGUMENT.

The bill will be discussed with reference to the merits, and separately with reference to the question of the standing of the petitioner as plaintiff in the Circuit Court, and certain miscellaneous questions of jurisdiction, etc.

Before entering upon the discussion of the merits, it will be convenient briefly to point out the different ways in which the plaintiff might have sought to contend for liability on the part of these defendants; then to point out the ground or grounds upon which he in fact in his bill endeavors to support that liability; and then to discuss the merits from the standpoint of the one or more grounds upon which the bill in fact endeavors to support liability.

It would have been competent to the plaintiff in his bill,—had he chosen so to plead,—to stand upon either one (and perhaps by alternative pleading, upon two or all) of three contentions, to wit:

(a) Upon the contention that, in the present case, without relying upon any adjudication whatever in Minnesota (except the mere common law judgment of L. Kimball & Co., assigned to Rogers, and under which Rogers was made a judgment creditor of the corporation, or the mere order appointing the plaintiff a so-called "Receiver"), he could set up and establish, in the Circuit Court below, every fact essential to liability,

including insolvency of the corporation, amount of its indebtedness, names and amounts of creditors, and so forth.

(b) Upon the contention,—going to the other extreme,—that everything material to this case had been established in Minnesota, including the fact of stockholding, and the proposition of legal liability on the part of the several defendants below, by a decree or decrees binding even upon non-resident stockholders.

(c) Upon the contention,—which would be a middle ground,—that certain facts relating to the merits, that is, the fact of insolvency of the corporation, the amount of its indebtedness, the claims of the several creditors, the net amount of assets of the corporation and the amount of shortage of assets, *et cetera*, had been established in Minnesota by a decree or decrees binding upon non-resident stockholders; leaving, however, the fact of the amount of stockholding on their part, and the proposition of liability on their part, not adjudicated upon in Minnesota in a manner binding upon them, but open to establishment as against Pennsylvania defendants in the Circuit Court below.

The first of these three possible schemes of action, the bill evidently does not set up. It is not entirely clear that the bill does not attempt to set up the second of those possible schemes of action. It is plain that the bill does attempt to set up (either as the sole, or as an alternative ground of action) the third of of these possible schemes of action.

This brief will, therefore, in dealing with the merits, deal with the bill on the theory that it sets up either one or both of the second and third of these possible schemes of action, but not the first.

The argument will, therefore, be presented under four principal heads, as follows:

I. The merits of the suit in its aspect of a mere action upon a foreign judgment personally binding upon the

present defendants and determining their liability, and leaving open here nothing but the question of valid existence of the foreign judgment in the foreign forum.

II. The merits of the suit in its aspect of a suit resting upon a binding adjudication (or binding adjudications) in Minnesota, of insolvency of the corporation, indebtedness of the corporation, claims of the several creditors, amount of assets and shortage of assets; but leaving open, as a question not adjudicated upon in Minnesota, in a manner binding upon these defendants, the fact and the amount of stockholding on their part and the proposition of liability on their part.

III. The question of the standing of the plaintiff in the Circuit Court below, on these two aspects of the bill, respectively.

IV. Various miscellaneous questions relating to jurisdiction and other matters, pertinent to both of the above-mentioned possible aspects of the bill.

This division of the argument is, perhaps, not in the strictest sense a logical division, inasmuch as some of the considerations to be presented are pertinent not only to one, but to both, of the two possible aspects of the bill; but it is thought to be the most convenient and practical division, with a view to simplicity and clearness and to the avoidance of repetition.

I.

THE MERITS OF THE SUIT IN ITS ASPECT AS A MERE ACTION UPON A FOREIGN JUDGMENT PERSONALLY BINDING UPON THE PRESENT DEFENDANTS, AND ESTABLISHING AND FIXING THEIR PERSONAL LIABILITY.

Under this head there will be presented the following contentions:

A. Such power as a State has to summon in or deal with nonresident stockholders, so as to render binding personal judgments against them, is dormant until called into life by a State statute.

B. There is no statute in Minnesota effectually providing for, or undertaking to provide for, substituted service upon nonresidents.

C. There is a statute in Minnesota expressly denying the jurisdiction of the State Courts over persons in the position of the present defendants.

D. Even if the statute law of Minnesota were otherwise, no service was asked for, ordered or made against the present defendants, in or by the Minnesota courts, in the case of Rogers vs. Minneapolis Trust Company, Receiver, et als. (the suit in which, if at all, the personal liability of the nonresident stockholders was dealt with).

E. Service upon the Northwestern Guaranty Loan Company, as a corporation, in either of the above-mentioned Minnesota suits, was not such service as would bind the present defendants, on the question of their personal liability.

A. Such power as a State has to summon in or deal with non-resident stockholders, so as to render binding personal judgments against them, is dormant until called into life by a State statute.

This proposition has ordinarily come into question in cases where a state has undertaken to exercise the power of excluding a non-resident from rights in property lying within the state. In respect of such cases, the necessity of a statute is well established.

Arndt vs. Griggs, 134 U. S., 316.
Hart vs. Sansom, 110 U. S., 151.

It would seem to follow *a fortiori* that a statute is necessary to support a personal money decree against a non-resident not served with process.

B. No Statute in Minnesota effectually providing for (or undertaking to provide for) substituted service upon non-residents.

Such a provision would be found, if at all, in those portions of the Constitution or those statutes which deal either with the matters of stockholders or of superadded liability (Constitution of Minnesota, General Statutes, 1878, Chap. 76, Sections 16–22; General Statutes, 1894, Secs. 5904–5911); or in the general statutory provisions as to procedure against non-resident defendants. Those statutes contain no such provision.

But we need not rest upon our own examination of the statute books; for the Minnesota Courts recognize the fact that there is no such statute.

In

Commercial Bank of St. Paul vs. Azotine Co. *et al.*, 66 Minn. 413 (1896),

it was held that findings as to the amount of stock held by non-resident stockholders not having property in, or served with process within, the State, *or any determination as to their liability*, would have been useless, as no one would have been bound by such findings.

In

Harper vs. Carroll, 66 Minn., 487 (1896),

it was assumed (p. 507) that the judgment of the Court could not bind non-resident stockholders upon whom service within the State could not be had.

In

Clarke vs. Cold Spring Opera House Co., 58 Minn., 16 (1894),

it was assumed that no judgment rendered in the suit could bind those stockholders not within the jurisdiction of the Court,—inability to reach by process being there viewed as an excuse for not bringing all the stockholders into the suit.

The decree in the case of

First Nat. Bank of Winona vs. Winona Plow Co., 58 Minn. 167 (1894)

was only for a "judgment against stockholders of whom or whose property *the Court has jurisdiction.*"

For other cases where it appears to have been assumed that non-resident stockholders are not bound, see

Mohr vs. Minn. Elevator Co., 40 Minn., 343 (1889).
Arthur vs. Willius, 44 Minn., 409 (1890).
Densmore vs. Shepard, 46 Minn., 51 (1891).
Frost vs. St. Paul Banking and Investment Co., 57 Minn., 325 (1894).
Nat. German American Bank vs. Tafley, 57 N. W. Rep., 1065, 1897).
Minneapolis Base Ball Co., vs. City Bank, 66 Minn., at p. 443.
Johnson vs. Fiscer, 30 Minn., at p. 176.

Indeed, this theory of the absence of any such statute in Minnesota, prevades not merely the Minnesota reported cases, but the whole record of the very suit relied on by the present petitioner, Rogers vs. Minneapolis Trust Company, Receiver, *et al.*, from the bill to the latest decree.

The amended complaint (Record, p. 20, *et seq.*) alleged the *names* and the *individual holdings* of all alleged stockholders (Record, pp. 25-32), and disclosed that most of them were non-residents ; and *expressly stated* (Record, p. 33, VI.), *that all but* about twenty certain defendants, specifically named, were non-residents " and have no property of any kind subject to levy on execution within this state," and *expressly disavowed the plan of asking the Court to take jurisdiction of them*, by adding (Record, p. 33, VI., middle of page), " *and the plaintiff has no means of getting jurisdiction over them in this action.*" This was emphasized by the prayers (Record, p. 33, VI.), under which the plaintiff prayed for relief against such defendants as " *shall become parties to this action*," and then prayed (Record, p. 34, " Second "), that the Minneapolis Loan and Trust Company (the Receiver in the insolvency suit), or some other person be appointed Receiver in the Rogers suit, *with power and authority to proceed against nonresident stockholders.*

This view is followed throughout by the Court, in all its order and decrees :

(1) The summons ran (Record, p. 17, 6th line) in the ordinary form for service within the State.

(2) By treating in all the decrees all the *twenty certain Minnesota defendants* as a class by themselves, and *specifically adjudicating stockholding and liability of them as of a class by themselves* (Record, p. 50, "As Conclusions of Law ; " Record, p. 53, middle ; Record, p. 55 ; Record, p. 86, " Ninth ").

(3) By stating in the decree (Record, p. 50), " none of the defendants named in the title of this case, ex-

cept those heretofore named as served with the summons in this action [that is, said about twenty certain Minnesota defendants] have been served, nor have they appeared or taken part in any of these proceedings. They are are all non-residents of this state and have continued to be since the commencement of this action."

(4) By the recital in the decree of February 8, 1897 (Record, p. 54, Eighth), of *lack of any personal judgment* against *non-residents*, and by the express statement that the plaintiff was appointed Receiver to take steps against "the non-resident stockholders of said defendants Northwestern Guaranty Loan Company, *against whom no personal judgment herein has been ordered* for the enforcement and realization upon their stockholder's liability," and to that end to bring suits in foreign jurisdictions.

That this latter quotation applies to all non-resident stockholders conspicuously appears from the whole record; throughout the record, from the amended bill to the last decree, about twenty certain Minnesota stockholders were treated as one class, with *personal judgments against them*, and the whole body of non-resident alleged stockholders were treated as another class, with express statement of lack of service upon them, and no profession of an attempt to pass any judgment binding upon them.

C. A statute in Minnesota expressly denying the jurisdiction of the State Courts over persons in the position of the present defendants.

The proposition that Minnesota does not attempt to reach non-residents is a matter of express statute in that State.

G. S. 1894 of Minn., Section 5201, provides that "no natural person is subject to the jurisdiction of a court

of this State unless he appears in the court or is found within the State, or is served with process therein, or is a resident thereof, or has property therein upon which the plaintiff has acquired a lien by attachment or garnishment, and then only to the extent of such property, except in cases where it is otherwise expressly provided by Statute."

[G. S. 1866, C, 66, Sect. 55; G. S. 1878, C. 66, Sect. 70.]

See, also, G. S. 1894, Sect. 5204.

D. Even if Minnesota statute law were otherwise, nevertheless, no service asked for, ordered or made, against the present defendants, in or by the Minnesota Court, in Rogers vs. Minneapolis Trust Co., Receiver, et als.

This clearly appears from the analysis presented immediately above, of the bill and decrees in that suit.

E. Service upon the Northwestern Guaranty Loan Co., as a corporation, in either of the above mentioned Minnesota suits, was not such service as would bind the present defendants on the question of their personal liability.

It may be conceded that, under the familiar principles of law, service upon a defendant corporation is sufficient to bind all the stockholders, in all ordinary suits against corporations. This rule is dictated by convenience and practical necessity, in all cases where the corporation adequately represents the stockholders, that is to say, when the interests of the corporation as such, and of the stockholders personally, are identical.

It is substantially the same rule by which in many cases suit with reference to trust property may be brought against a trustee, without joining the *cestui que trust* as a party. It follows that where, in an ordinary suit against a corporation, service was properly made upon the corporation and judgment regularly entered against it, the validity of such judgment against the corporation cannot be subsequently attacked on the ground that process was not served upon the stockholders personally. But in order to maintain the present suit in the aspect now under consideration—namely, its aspect as a suit upon a judgment fixing the personal liability of the present defendants—the plaintiff must prove not only a judgment against the corporation, as to corporate assets and liability, and binding upon the present defendants as to those matters, but also a judgment against the present defendants personally, dealing specifically with and establishing their personal liability. As will be presently shown, the superadded liability of stockholders under the Minnesota Statutes is not an asset of the corporation, but a contractual liability to the creditors. The corporation, as such, in no sense adequately represents the stockholders in a controversy regarding such superadded liability; it either has no interest in such controversy, or an interest hostile to that of the individual stockholders. The circumstances determining the individual liability of any particular alleged stockholder are to a large extent personal to him. The questions whether he is a stockholder, when he became such, how much stock he holds, and what, if any, personal defenses he may have, are different questions in the case of each alleged stockholder, and questions on which such alleged stockholder is entitled to be heard. There is no general rule of law and no statutory provision or corporation by-law in the present case, by which service upon the corporation is made such service as will bind the stockholders, as regards the individual liability in question.

This proposition is sufficiently established by the following cases:

Hancock Nat. Bank vs. Farnum, 176 U. S., 640, 643.
Whitman vs. Oxford Nat. Bank, 176 U. S. 559, 563.
Wigton vs. Bosler, 102 Fed., 70.
Ekhart Nat. Bank vs. Northwestern Guaranty Loan Co., 30 C. C. A., 632; 87 Fed. 252.

This subject may be concluded by referring once more to the many places in the record of this case where it is admitted that no judgment binding the present defendants personally has been obtained.

It thus appears that the Minnesota courts—whatever *power* may have resided in the State of Minnesota, or in its courts—*has never in fact* undertaken to pass a judgment or decree *as against the nonresident stockholders*, adjudging against them the fact and the amount of their stockholding, or the existence or amount of a personal liability on their part.

It follows that the present suit cannot be maintained as a mere suit upon a judgment, personally binding upon the present defendants and determining their personal liability.

II.

THE MERITS OF THE SUIT IN ITS ASPECT OF A SUIT RESTING UPON A BINDING ADJUDICATION (OR BINDING ADJUDICATIONS) IN MINNESOTA, OF INSOLVENCY OF THE CORPORATION, INDEBTEDNESS OF THE CORPORATION, CLAIMS OF THE SEVERAL CREDITORS, AMOUNT OF ASSETS AND SHORTAGE OF ASSETS, BUT LEAVING OPEN, AS A QUESTION NOT ADJUDICATED UPON IN MINNESOTA, IN A MANNER BINDING UPON THESE DEFENDANTS, THE FACT AND THE AMOUNT OF STOCKHOLDING ON THEIR PART AND THE PROPOSITION OF LIABILITY ON THEIR PART.

Although under the last preceding heading there has been discussed at length the merits of the suit in its possible aspect as an action upon a foreign judgment, that aspect of the suit will probably not be relied upon by the present petitioner, in the argument, but he will probably rely upon the aspect of the suit stated in the present heading. That this is so appears from the general language of the bill and from the evident weakness of the bill upon the first possible aspect of it, and also from the fact that this is substantially the view taken of the plaintiff's rights and of his possible contentions by the highest Court which has as yet made a determination in his favor (Hale vs. Hardon, 95 Fed., 747); and from the explicit language of the bill in paragraph XV. (Record, p. 13).

Under the present head of this brief, therefore, we are probably dealing with the plaintiff's real contention.

Under this head the following contentions will be presented:

A. Upon general principles of jurisprudence binding everywhere—in the absence of a statute of competent jurisdiction to the contrary—all the questions, preliminary and final, involved in such a stockholders' liability as is now in question, including the question of the liability of stockholders, resident and non-resident, must be dealt with in a single omnibus proceeding in a single forum (or a group of affiliated proceedings working in express co-operation, and all in the same forum, and so constituting in substance a single omnibus proceeding), and that forum is the home forum of the corporation.

B. No jurisdiction except the home jurisdiction can, by legislation annul or modify such rule in respect of its operation upon corporations of such jurisdiction.

C. The State of Minnesota has never annulled or modified this rule of general jurisprudence.

D. Regardless of the existence and binding force of such general principle of jurisdiction (existing apart from competent modifying statute), it is competent to the home jurisdiction of a corporation, in dealing with stockholders' liability, to recognize or affirm, or, if and in so far as it might deem proper, to enlarge or to create a requirement of such omnibus proceeding in its own tribunals.

E. The State of Minnesota has, by statute, affirmed, and,—if the rule otherwise would not have been fully operative,—has enlarged the general rule to the full breadth of it, as it is stated above under sub-heading A, and that rule, as so stated, is therefore a binding rule of Minnesota law, and is upon that ground, if upon no other, binding everywhere. In its legislation the State of Minnesota has elected not to undertake to deal with stockholders who are not resident and cannot be

served (or their property reached), within the State; but its requirement of an omnibus proceeding in Minnesota is none the less absolute and exclusive.

F. This legislation of Minnesota is fatal to the present bill, not only upon the grounds and from the point of view stated in the last preceding sub-headings, but also, and apart from the fact that the procedure which it requires is an omnibus procedure—from the point of view that any specific form of procedure fixed, in respect of such a liability, by the jurisdiction which creates the liability, is an exclusive form of procedure which goes out of the forum as well as in it; and the procedure now attempted must, therefore, fail on the ground, not merely that it is not an omnibus proceeding in Minnesota or elsewhere, but that it is an attempt to depart from a form of procedure prescribed by the laws of Minnesota.

G. Even if the liability of these defendant stockholders could be established in a non-omnibus proceeding like the present, after the questions of the assets and indebtedness of the corporation had been adjudicated in a general suit, there has in the present case been no complete and binding adjudication of those questions.

H. It is a general rule of jurisprudence binding everywhere, in the absence of a statute to the contrary of a competent jurisdiction, that an ancillary suit must be brought in the same forum and in the same courts as the principal suit. The present suit is, within the meaning of this rule, ancillary to the suit of Rogers vs. Minneapolis Trust Company, Receiver et al. in Hennepin County District Court, Minnesota, and that Court in that county has, therefore, exclusive jurisdiction of this suit.

It is no objection to the enforcement of the foregoing principles, in a given instance, that the jurisdiction in which alone under those principles (as they stand in a given instance) relief can be had, is not

competent to enforce that relief, whether its lack of competence so to do arises *(a)* from difficulties not capable of being surmounted, or *(b)* from deliberate failure, on the part of such jurisdiction, to utilize sufficiently its constitutional powers against non-resident stockholders of its corporations.

A. Upon general principles of jurisprudence binding everywhere,—in the absence of a statute of competent jurisdiction to the contrary,—all the questions, preliminary and final, involved in such a stockholders' liability as is now in question, including the quesion of the liability of stockholders, resident and non-resident, must be dealt with in a single omnibus proceeding in a single forum (or a group of affiliated proceedings working in express cooperation, and all in the same forum, and so constituting in substance a single omnibus proceeding), and that forum is the home forum of the corporation.

This is not a matter of local law, but of universal law resting upon fundamental principles.

The general principles of equity jurisprudence forbid the entertaining of a suit where the limits of the jurisdiction of the Court, or other circumstances, are such, that on the one hand no complete adjustment of all rights in question can be effected and on the other hand no decree can be given which may not materially affect the absent parties; and this rule is, in this country, viewed as *jurisdictional*, as between different Federal courts; between different State courts, and between Federal courts and State courts. In other words, it is a familiar rule that where persons not

joined are necessary parties, and their joinder would oust the jurisdiction based on diversity of citizenship, the Federal courts will not take jurisdiction.

And when such necessary parties are not capable of being reached with process, the Federal courts issue a final decree, only if all interests are adequately represented, or a decree can be given which will affect only the parties before the court. If it appears in advance that no final decree can be given, of course jurisdiction will not be taken.

Shields vs. Barrow, 17 How., 130.
Williams vs. Bankhead, 19 Wall., 563.
McArthur vs. Scott, 113 U. S., 340.

The rule is so broad, and is so thoroughly a rule of reason, fitness, and principle, that it operates to protect from injury even claims which would only *indirectly*, not in any *binding* manner, be effected by the decree.

Among the matters which, it is held, should be dealt with in a manner which must result in unity and harmony of determination, are the creation and the gradual shrinking of final extinction of corporate life membership in the corporation (and thus title to stock, where membership goes by stock); title to office; the keeper, the keeping and the keeping-place of the records; the places for meetings; the adjustment of conflicting rights of members; the validity of meetings and of votes.

Wilkins vs. Thorne, 60 Md., 253 (1883).
North State Copper, etc., Co. vs. Field, 64 Md., 152 (1885).
State vs. Curtis, 35 Conn., 374.
Society for the Propagation of the Gospel vs. New Haven, 8 Wheaton, 464, 483, 484.
Republican Mountain Silver Mines vs. Brown, 58 Fed. Rep., 644, 648.
Importing Co. vs. Locke, 50 Ala., 332, 335.
Dodge vs. Pyrolusite, etc., Co., 69 Ga., 665.
Halsey vs. McLean, 12 Al.. 438.
Smith vs. Mut. L. Ins. Co., 14 Al., 336.
Kansas Co. vs. Topeka Co., 135 Mass., 34.

Bank of North America vs. Rindge, 154 Mass., 203.
Higgins vs. Central New England, etc., R. R., 155 Mass., 176.
New Haven Horse Nail Co. vs. Linden Spring Co., 142 Mass., 349.
Post & Co. vs. Toledo, etc.. R. R., 144 Mass., 341.
Pierce vs. Equitable Life Assur. Soc., 145 Mass., 56, 63.
Erickson vs. Nesmith, 15 Gray, 221 ; 4 Al., 233.
Erickson vs. Nesmith, 46 N. H., 371.
Rice vs. Hosiery Co., 56 N. H., 114.

These principles apply, not only to *judicial*, but to *legislative*, action.

Canada Southern Ry. Co. vs. Gebhard, 109 U. S., 527.
See, also, Republican Silver Mines vs. Brown, 58 Fed. Rep., 644, 648.

Some of the cases above cited rest the requirement of exclusiveness in some one forum (which they all specify as the home forum), upon the *rights of soverignty* of the home State, in matters relating to corporations of its own creation. But they also give other reasons, which require exclusiveness in some one forum—reasons, of a *practical* nature. Many such reasons readily suggest themselves. If, for example, questions of this character were not limited to some one proceeding (or group of co-operative proceedings in some one forum) having power to decide them *once and for all*, there might be, in a given corporation, two sets diffrent of members, each with title to office, under the decision of some tribunal, conflicting meetings, conflicting quorums, conflicting boards of directors, conflicting presidents, treasurers or cashiers, conflicting records, or certified copies of records ; an assessment upon *some*, but not upon *all*, under a statute requiring assessment upon *all* if upon *any*. Some might be adjudicated to have paid their subscriptions to stock, and others not, although all might have done the same specific act.

The principles of law above stated have been recognized with great breadth in Minnesota and in cases of the same kind as the present.

In

In re Martin's Estate, 56 Minn., 420,

it was held that "no action or proceeding can furnish complete remedy or protect the rights of all persons interested except one which brings in all interested parties, the corporation, all the stockholders, and all the creditors."

And to the same effect, see

Minneapolis Base Ball Co. vs. City Bank, 66 Minn., p. 443.

Johnson vs. Fischer, 30 Minn., p. 176.

Pertinency of these Principles to a Case Like the Present.

Under these principles, the two separate and distinct resources of a corporation's creditors *(a)*, the assets of the *corporation itself*, and *(b)* the *assets of the creditors, in the form of stockholders' superadded liability*, although distinct from each other, *should*, nevertheless, be utilized and enforced harmoniously, either by a single judicial proceeding, or by different judicial proceedings working harmoniously and with such mutual interplay as to produce in the end a just and harmonious result. The result of such proceeding or proceedings taken as a whole *ought*, for example, to include, among other things, the following particulars:

There should be a *single roster of adjudicated stockholders*, and a *single table of the holdings of the several shares of stock*. Otherwise (for example), in a case requiring only a *partial* assessment, one might in the end be assessed seventy per cent. of his maximum liability, on the theory that the total stock issue was at one figure and another only thirty per cent. on the theory that the total stock issue was at a much larger figure; or, two different men might, in different tribunals or different suits, both be held as holders of certain disputed shares of stock; and many other similar irregularities might easily result.

There should be a single adjudication of the *times* of ownership of stock by the several stockholders; for otherwise two successive holders of certain share might *both* be held, or the wrong one might be held, or both might go free.

There should be a single determination of the dates of the incurring of the corporate liabilities to the several creditors, where that fact is material. (In the present case, prior to May 2, 1892, all contract liabilities above $50,000 in all were *ultra vires* and carried with them no stockholders' liability unless,—possibly a liability to refund values actually enjoyed by the corporation—an element not pleaded in this case).

There should be a single determination of the *character* of the indebtedness, whether contract or tort, secured or unsecured. The pertinency of these questions is fully brought out under a later head of this brief (IV., B, *infra*).

There should in a case standing like the present, be a *single* determination of the amount of capital stock *paid up*, the maximum indebtedness of a Minnesota corporation being limited, in one direction, by that amount, and any unpaid instalments being an asset of the corporation which would relieve the stockholders *pro tanto*.

When such principal facts are ascertained by a single tribunal, or a group, co-operative proceeding, all in courts having jurisdiction of all parties, then the enforcement in other tribunals of the *mere* pecuniary liability of a given individual *thus ascertained*, would be nothing but an action upon a judgment at law or in equity, as the case may be. But it is essential that there be required a *single proceeding*, extending to all the questions above enumerated, in order to reach a good, harmonious and practical result through unity.

The necessity that all questions of the personal liability of stockholders be adjudicated in the omnibus proceeding and be not left to subsequent distinct suits, appears from the fact that any personal defense

on the merits, successfully maintained by one alleged stockholder, will increase the proportion in which all the others are liable. It is necessary, therefore, that the *facts* as to each alleged stockholder individually be first ascertained, and judgment then given against each one found to be liable, in accordance with what has thus been established as to the rest. This can be done only in one omnibus proceeding or series of affiliated proceedings in one jurisdiction.

These principles have been applied in a great variety of ways, and in particular in support of the requirement of exclusive power of the home forum to deal with corporation matters, which, to avoid confusion, conflict and injustice—one might say, legal anarchy—from arising under our complex system of government, should be dealt with like the probate of a will, once and for all, in one proceeding.

Thus far, there have been presented considerations, most of which would be satisfied by a single proceeding or a group of expressly affiliated proceedings in *some one forum*, not necessarily in the home forum of the corporation. But it is evident that if this be sound, the omnibus proceeding must be exclusively in the *home* forum. For the cases cited above, in so far as they rest the requirement of singleness of procedure upon *sovereignty*, of course call for exclusiveness in the *home* forum; but in so far as they rest it upon *fitness and propriety*, they lead to the same result; for if there must be exclusiveness somewhere, that exclusiveness must, of course, be in the home State. That State, certainly, could not be excluded. Again, aside from the *right of the State* to exclusive jurisdiction over certain affairs of its own corporations, the questions above enumerated depend largely upon the construction of State statutes, and on matters of State policy, of which no foreign Court is an equally competent judge; and if there is to be one omnibus proceeding, *the stockholders may be said to have a right* to the adjudication of the home courts in that proceeding.

The principle of exclusiveness of the home forum is, in every particular, as pertinent between home State Courts (or Federal Courts sitting within the home State) as one class, and Federal Courts sitting outside the home State, as another class, as it is between Courts of different States. This proposition is illustrated in

State vs. Curtis, 35 Conn., 374, cited above, and is supported by many familiar lines of Federal decisions, and, among others, the numberless decisions in which the Federal Courts recognize, in a great variety of forms, exclusiveness in a State Court by *priority* of some sort, even in cases where it would undoubtedly be *competent to Congress* to deny State exclusiveness or to deny State jurisdiction altogether.

No State has ever gone farther in recognizing exclusiveness on the part of sister States than this Court has gone in prescribing rules of self-restraint for the Federal Courts as between themselves and the State Courts.

The same spirit runs all through the legislation of Congress—notably in the instance of State jurisdiction in respect of national banking associations.

It is no answer to these contentions to say that such matters as those now in question may be heard in a Federal Court sitting within the limits of the home State in cases of diversity of citizenship. This concurrent jurisdiction in the local Federal Court arises, not from a lack of requirement of uniformity in the rule as to a single and exclusive jurisdiction, but from the fact that, under our duplex system of government, the several States of the Union have, for certain classes of cases, two concurrent systems of courts ; namely, their own courts and the Federal Courts. The Federal Courts, when they intervene, as they often do, in matters which. upon principle, are exclusively for the several States, intervene by direct force of the Constitution of the United States ; that is to say, by an express concession of the jurisdiction by the States, and inter-

vene, not as foreign courts, but as domestic courts of the States, accepted by the States as one branch of their judiciary, though not under its control, by the compact of the Federal Constitution. Thus, it is an elementary principle that no sovereign can enforce the penaf laws of another sovereign ; Massachusett cannot try a man for violation of criminal laws of Rhode Island. But the United States can, by force of the constitutoin, exercise this naturally exclusive State jurisdiction, and try a man in its courts for murder consisting in the violation of the murder laws of one of the States.

Tennessee vs. Davis, 100 U. S., 257-271.

There is almost no limitation upon the right of the Federal Courts to intervene in State affairs not dealing in the strictest sense with State government, when diverse citizenship or other reason for Federal intervention, such as do not go to Federal subject matter, exists. Not only may a Federal government enforce a State criminal law, but it may take from the State by force and arms a man under State indictment, and try the question of his guilt or innocence upon *habeas corpus*.

In re Neagle, 135 U. S., 1.

Cases (if such shall be cited) where Federal Courts, proceeding by diversity of citizenship, have entered upon matters which naturally, and upon principle, would be within the exclusive jurisdiction of a State, if not explainable upon other grounds, such as submission to the jurisdiction by the defendants actually before the Court, will prove in every instance to be explainable upon the principles above stated, which are elaborately set forth and illustrated in

Tennessee vs. Davis, cited above.

A suit in a Federal Court in the home State is, therefore, in a proper sense, a suit in the home forum

It has invariably been held no objection to the application of the doctrines above set forth, that in a given

instance hardship would result. Repeatedly has this Court denied equitable relief, on the ground that it could not deal broadly and fully with the whole matter,—and this, even where it seemed plain that no other tribunal could deal with the matter more broadly.

B. No jurisdiction except the home jurisdiction can by legislation annul or modify the rule just elaborated in respect of its operation upon corporations of such jurisdiction.

C. The State of Minnesota has never annuled or modified this rule of general jurisprudence.

In so far as the principles laid down under the subheading last discussed, are based upon the sovereignty of a State over corporations of its own creation, the State may, of course by express statute, abdicate its exclusive right to jurisdiction. A familiar illustration of this principle is found in the action of Congress in abdicating the exclusive jurisdiction of the United States, over suits concerning the affairs of national banking associations. In so far as the principles above laid down are based upon general rules of equity, and are designed, in their application to cases of this class, to protect the stockholders from confusion of rights and unequal burdens, it is evident that they may, by express statute of a competent jurisdiction, be modified or repealed as regards a particular class of proceedings, so long as the statute is not so palpably unreasonable and unjust as to be unconstitutional. Just as a state may by statute impose a personal liability upon stockholders for corporate debts, so a State may by express enactment require all

persons who become members of certain corporations, or classes of corporations, to surrender their right, in respect to the particular statutory liability in question, to the protection of the equitable principles under discussion. That is to say, the State may by express enactment require every person joining the corporation in question to consent to an *indidividual and several* liability enforceable against him alone by any single judgment creditor under the conditions described, such enforcement leaving the stockholder to obtain such remedies as he may, by way of contribution, or otherwise, against other stockholders, by subsequent application to a court of equity.

But it is equally evident that these things can be done only by the home State. So far as the question is one of sovereignty, the right of the State cannot be taken away by foreign statutes, but can only be waived by action of its own legislature. Again, so far as the question is one of the rights of stockholders, the result is the same. The superadded liability of stockholders is admitted on all sides to be contractual, and arises from the assent to the provisions of statutes and by-laws, which the Courts find in the act of joining the corporation. But as that act imposes a contractual liability or not, according to the legislation of the State which charters the corporation, only that State can increase or diminish the liability, or determine whether it shall be individual and several or joint, enforceable against any stockholder separately, or only against all in one proceeding.

Where the home State has not determined those questions by express statute, the general principles of equity above stated have full force. When it has so determined them, its determination is binding everywhere.

The power of a State to regulate all matters of procedure regarding its own corporations, and the exclusiveness of that power, are well brought out in

Canada So. Ry. Co. vs. Gebhard;
Republican Silver Mines vs. Brown, both cited above.

In what was said under the next preceding subheading, recent decisions of this Court were not forgotten, which will doubtless be cited as opposed to the contention that there must be a general and complete omnibus proceeding. The case most likely to be emphasized by the other side in this connection is

Whitman vs. Oxford Nat. Bank, 176 U. S., 559.

That case may be taken as fairly representative of the line of decisions likely to be put forward by the plaintiff's counsel, besides being the latest authoritative deliverance of this Court on the subject.

Hancock Nat. Bank vs. Farnum, 176 U. S., 640, merely adopted the decision of the Whitman case on the point now under discussion.

It will now be shown that these cases in no way conflict with any of the contentions of the present brief, but merely illustrate what has just been laid down as to the power of the home jurisdiction.

Whitman vs. Oxford Nat. Bank,

turned upon a provision in the Constitution of Kansas by which it is provided (Section 2, article 12, Constitution of 1859) that sums due from corporations "should be secured by *individual* liability of stockholders to an additional amount equal to the stock owned by each stockholder." In the Kan. Gen. Stat. of 1868, Chapter 23, Section 32, it is provided that whenever execution shall be issued against a corporation (certain classes of corporations excepted) and there cannot be found any property whereon to levy such execution, then execution may be issued "against *any of the stockholders*, to an extent equal in amount to the amount of stock by *him or her* owned, together with any amount unpaid thereon"; such execution to be issued in a manner specified, and only "upon an order of the Court in which the action, suit or other proceeding [against the corporation] shall have been brought or instituted; * * * *or the plaintiff in the*

execution may proceed by action to charge the stockholders with the amount of his judgment."

The plaintiff in the Whitman case had obtained a judgment against the Kansas corporation, upon which execution had issued, but no assets had been found upon which to levy, and it appeared that the corporation had, in fact, no assets. The judgment creditor then brought an action, in the United States Circuit Court for the Southern District of New York, against Whitman as a stockholder in the Kansas corporation, to enforce his individual liability under the Kansas constitution and statutes. It was objected that the suit should have been brought in equity against all the stockholders instead of at law against one; but the United States Supreme Court overruled the objection adopting the language of the opinion in

Flash vs. Connecticut, 109 U. S., 371.

The statutory provision in question in the latter case made the stockholders of a corporation "*severally and individually liable*" to the creditors of the company to the amount of their stock "until the whole amount of capital stock fixed and limited by such company" should have been paid in and a certificate thereof recorded. In that case the Court said (p. 380):

> "But in this case the statute makes every stockholder *individually* liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend upon the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can. Such actions are maintained without objection in the Courts of New York, under Section 10 of the statute relied on in this case."

In accordance with this statement of the law, the Supreme Court held in the Whitman case that the action was properly brought, and a judgment for the plaintiff was affirmed.

Such a decision is entirely harmonious with the claims of the present brief.

It will be noted that the Constitution and statutes of Kansas expressly provided for an *individual* liability of *any one stockholder* to *any one creditor*, and expressly directed that such liability should be enforced in essentially the manner in which it was enforced. The decision, therefore, does not say that the general rules of equity, requiring adjudication of the rights and liabilities of all persons concerned, in a single suit or proceeding, are not recognized by the Supreme Court, nor that the general rule based upon sovereignty, which gives to the home forum exclusive jurisdiction of a large class of affairs relating to corporations, is not recognized by that Court and is not applicable to proceedings to enforce the superadded statutory liability to stockholders. The decision merely illustrates what has been said above, to the effect that the home State may abdicate its rights as sovereign to exclusive jurisdiction, and may attach to the statutory liability which it alone creates, such individual and *several* character and such forms of procedure, within reasonable limits, as it chooses.

The decision in the Whitman case is obviously sound and is supported by numerous earlier decisions of the United States and the State Courts, a large proportion of which are cited in the opinion. Those decisions establish the propriety of a separate proceeding against a single stockholder, *where such stockholder is by statute expressly rendered individually and severally liable.* But they go no further. In what was said under the next preceding subdivision of this brief, it was intended only to lay down general principles of equity recognized and enforced when not changed by statute. In the Whitman case and the other cases which support it, there had been such

changes by statute as regards a particular statutory proceeding. In the present case the constitutional and statutory provisions of Minnesota do not expressly or impliedly forbid the application of the equitable principles in question. It follows that, without more, those principles would be fully applicable to proceedings like the present one, and they seem always to have been distinctly recognized by the Minnesota Courts as so applicable.

In re Martin's Estate, 56 Minn., 420.
Minneapolis B. B. Co. vs. City Bk., 66 Minn., 443;
Johnson vs. Fischer, 30 Minn., 176;
all cited above.

But, as will now be shown, the matter is placed beyond any doubt by the fact that the Minnesota statutes, far from expressly providing for an *individual and several* liability, enforceable against a single stockholder, do expressly provide for an omnibus proceeding for the adjudication of the rights and liabilities of all parties in interest, in entire accord with the general principles of equity above laid down.

D. Regardless of the Existence and Binding Force of Such a General Principle of Jurisdiction as Has Been Laid Down, it Would be Competent to the Home Jurisdiction of a Corporation, in Dealing with Stockholders' Liability, to Create, or Enlarge, or Affirm or Recognize a Requirement of an Omnibus Proceeding in the Home Forum.

This proposition appears with sufficient clearness from the considerations already presented in the discussion of the two preceding subheads.

E. The State of Minnesota Has by Statute Affirmed—and, if the Rule Would Otherwise Not Have Been Fully Operative, Has Enlarged—the General Rule Requiring an Omnibus Proceeding to the Full Breadth of It, as Stated Above Under Subheading A, and That Rule, as so Stated, is Therefore a Binding Rule of Minnesota Law, and Upon That Ground, if Upon No Other, is for the Purposes of This Suit Binding Everywhere.

The provisions of the Minnesota Statutes on this question have already been set forth in the opening statement of this brief. It will be seen by reference to that statement that the statutes expressly provide for an omnibus proceeding, in which *(a)* an account shall be taken of the assets and debts of the corporation (Sect. 5906); *(b)* receivers (obviously of the *assets of the corporation*) shall be appointed, unless the corporation is without assets (Sects. 5906, 5907); *(c)* notice shall, whenever necessary, be given to all creditors to present their claims on pain of losing all share in the final distribution of any sums recovered (Sect. 5911); *(d)* there shall be a fair and just distribution among the creditors of any corporate assets there may be (Sect. 5908); *(e)* the amount of unpaid stock subscriptions shall be ascertained and collected (Sect. 5909); *(f)* if the debts still remain unsatisfied the respective further liabilities of directors and stockholders shall be ascertained (Sects. 5910, 5907); *(g)* the Court "*shall enforce the same by its judgment, as in other cases*" (Sects. 5907, 5910).

Certain qualifying phrases in some of these provisions in no way change the general nature of the proceeding required. For example, the words "when necessary," in the provision for an account of assets and debts

(Sect. 5906) obviously provide for a case in which the assets and debts are so few and present so little complication that they can be ascertained *without an account.* The same words, in Section 5911, obviously provide for cases, for example, in which all the creditors come into the suit without being summoned, or in which the *assets of the corporation* are shown to be ample for all debts, and nothing is necessary except an ordinary judgment and execution against the corporation.

The provisions of the statute, taken together, are plainly intended to provide for an omnibus suit, to which all persons interested shall be parties and in which all questions shall be adjudicated. The intention that the stockholders shall be made parties appears from the words at the end of Section 5907, "to ascertain the respective liabilities of such directors and stockholders, and *enforce the same by its judgment;*" and again at the end of Section 5910, "adjudge the amount payable by each, and enforce the judgment as in other cases." Such enforcement would clearly be impossible unless the stockholders were parties. The same intention appears from the words "In all cases in which * * * the stockholders * * * are made parties to an action in which a judgment is rendered" (Sect. 5909). The language of the opening clause of Section 5910 ("If the debts of the company *remain unsatisfied*") shows that that section is to be read with Section 5909, and both are, therefore, subject to the condition that the stockholders are made parties. In other words, the statute does not contemplate *any* enforcement of the personal liability of stockholders, except when they are made parties to the general suit.

The intention that all questions of rights and liabilities, *including the personal liability of stockholders,* shall be adjudicated in the same general suit, appears clearly from the express provisions above quoted, to the effect that the Courts "shall ascertain" (Sect. 5907), and again "shall adjudge" (Sect. 5910) the re-

spective liabilities of the stockholders, and "shall enforce" (Sects. 5907, 5910) the judgment against the stockholders in the ordinary way ("as in other cases").

The intention that the omnibus suit provided for shall be brought in the home forum is distinctly expressed in Section 5905: "he may file his complaint for that purpose [to charge the stockholders] in any district court [evidently of Minnesota] which possesses jurisdiction to enforce such liability."

Finally the fact that no distinction is contemplated in the treatment of domestic and foreign stockholders, appears *(a)* from the absence of any hint of a provision for reaching nonresident stockholders, and this in a statute obviously intended to provide for the whole subject; *(b)* from the language in the passages above quoted, where "the stockholders" are referred to, evidently as an entire class, and not "such stockholders as shall reside within the jurisdiction" or "such as can be reached with process."

The construction of the statutory provisions being so obvious, and their language in general so explicit, it is useless to object that such an interpretation makes the statute fatally defective for many cases, by providing no way of reaching non-resident stockholders. It is very evident from a reading of the statute that the possibility that there might be such stockholders was not present to the minds of the legislature, and that no provision was made for such a case. But this fact does not answer the proposition that the statute recognized and affirmed the general principle that justice can be done in such a case, only by adjudication in a single omnibus proceeding, or series of affiliated proceedings, in the home forum, of all questions in issue, and an adjustment of equities accordingly. That principle is, therefore, not weakened or discarded in connection with stockholders' liability by the Minnesota statutes, but is expressly embodied in those statutes to its full extent; and even without the existence of such a general equitable principle the

same rule would be, *by legislative enactment*, the law of this case.

The Minnesota Legislature ought undoubtedly to have made its statutory procedure complete and effectual by providing for substituted service on non-residents, and the result of its failure to do so may be that in cases like the present no effective remedy can be had in any court; but that consideration does not alter the effect of what has been clearly and explicitly enacted, in determining the character of the liability and the general rules of its enforcement; nor does this Court sit to correct the legislative errors of Minnesota.

F. The Minnesota legislation fatal to the present bill from the point of view that any specific form of procedure fixed in respect of such liability, by the jurisdiction which creates the liability, is an exclusive form of procedure, which goes out of the forum as well as in it; and the procedure now attempted must therefore fail on the ground not merely that it is not an omnibus proceeding, but that it is not the form of procedure prescribed by the laws of Minnesota.

The principle is well settled that when a purely statutory liability is created and a statutory remedy provided, the remedy enters into the nature of the liability and is exclusive of all others. There may be cases in which such a statutory remedy may properly be sought in courts (for example in the Federal courts sitting within the State which created the liability) whose practice does not provide precisely the procedure prescribed by statute; but in such a case substantially the same form of remedy must be followed, if any remedy is to be had. This principle of the exclusive-

ness of the statutory remedy is authoritatively established for the United States Courts by the decisions of the Supreme Court in :

Pollard vs. Bailey, 21 Wall., 520, 527.
Bank vs. Francklyn, 120 U. S., 747, 756, 758.

That the Minnesota statutes provide the manner in which the superadded liability of stockholders shall be enforced, has already been shown (see Minnesota statutory provisions set forth in the statement at the beginning of this brief, and the discussion under the preceding heads). That the present procedure is not of the kind prescribed by the Minnesota statutes is sufficiently established *(a)* by the considerations presented under sub-heading "E" above, which need not be repeated here ; *(b)* by the considerations presented under heading III, sub-heading A below, which therefore need not be stated at length here ; *(c)* by the fact that after the last decree in Rogers vs. Minneapolis Trust Company, Receiver, *et al.*, and after the appointment of the present plaintiff as so-called "Receiver," the Minnesota legislature passed a statute providing for the collection of the superadded liability of non-resident stockholders in a manner similar to that attempted in the present suit, thus showing that in the opinion of the Minnesota Legislature, there was up to that time no such statutory provision.

G. Even if the personal liability of these defendant stockholders could be established in a non-omnibus proceeding like the present, after the questions relating to the assets and indebtedness of the corporation had been adjudicated in a general suit, there has in the present case been no complete and binding adjudication of those questions.

It has thus far been contended that, both on general principles and by competent legislative enactment, the Constitutional liability of stockholders in Minnesota corporations can be enforced only in an omnibus proceeding, including within its scope the binding adjudication of the personal liability of each stockholder, and to that end having all the stockholders as parties. The proposition that, in the absence of a competent statute to the contrary, all questions concerning the assets and indebtedness of the corporation must be effectually adjudicated in a single suit, can hardly be seriously questioned. But the plaintiff may contend that there has been an adjudication of these matters; that as to such matters service on the corporation binds all the stockholders; and that the adjudication is, therefore, binding on all. He may then argue that neither the general rules of law nor the Minnesota statutes require the remaining questions, relating to the personal liability of each stockholder, to be adjudicated in a single omnibus suit. Such contention is confidently believed to be unsound, for reasons above set forth; but for purposes of argument it may for the moment be assumed to be true. The doctrine would then be that all material matters relating to *the indebtedness and the assets of the corporation*, and such matters only, must be determined in one suit. But so far as appears from the record there has never been, in the present case, any adjudication, in one or many suits, of *all* the material matters relating to the assets and indebtedness of the corporation. Such matters which are lacking, are the dates of incurring the various debts of the corporation; the character of such debts; the amount of unpaid subscriptions (which are assets of the corporation); what proportion, if any, of the indebtedness is, or was when contracted, in excess of the debt limit established by the by-laws, and therefore *ultra vires*, &c., &c. The pertinency of these matters is fully brought out in a subsequent portion of this brief (IV., B, *infra*). That they relate to the assets or to the indebtedness of the

corporation is obvious. It follows that they must be determined in the general omnibus proceeding, even under the limitation of the necessary scope of that proceeding conceded for the purposes of the present subheading. Admitting that limitation, it is still true that such a suit as the present one cannot be maintained until those matters have been adjudicated in the original forum in Minnesota.

But, conceding for the present that the actual adjudication of personal liability need not be in an omnibus suit, provided all matters relating to the assets and liabilities of the corporation are first adjudicated in such a suit, in a manner binding upon all stockholders, the Minnesota suits here relied on fail to fulfil that condition, not only because certain essential matters were not passed upon, but also because such adjudications as were in fact made in Minnesota, either in the insolvency proceeding or in Rogers vs. Minneapolis Trust Company, Receiver, *et al.*, are not binding adjudications *quoad* the personal liability of these defendants.

Unquestionably the Courts of Minnesota, under existing statutes, had power, *as between the creditors of the corporation and the corporation itself*, to adjudge the corporation insolvent; to put its assets into the hands of the Minneapolis Trust Company as Insolvency Receiver; to make such Receiver's degree of success in realizing upon the assets binding; to ascertain the list of creditors, and the amounts of their several claims, and priorities, if any, among them; to exclude creditors, resident and non-resident, failing to intervene and to distribute the assets of the corporation among intervening creditors, etc.

Those courts had power also to make their such action binding upon *resident* stockholders.

Those courts had power still further to make such action binding upon *non-resident* stockholders to the extent of extinguishing the actual value of their *stock:* for, to that end, a stockholder is necessarily bound by proceedings taken against the corporation.

But those adjudications, while operative to that extent, could not be operative *affirmatively* against *non-residents*, without a statute of Minnesota calling into action the power of the State over *non-resident* stockholders, and judicial proceedings, under such a statute, with substituted service, carrying out the provisions of the statute. As has been pointed out above, there was no such statute, and there were no such proceedings. It follows that those adjudications, in so far as now invoked as having had an *affirmative* operativeness upon non-resident stockholders are, in that aspect, of no effect.

The situation is similiar to that constantly presented, where property within a given State, belonging to a non-resident defendant, is attached or levied upon in an action against him, or is subjected to a trust adverse to his interests. In such case a judgment *in one sense* binds him, in that it takes away his such property, or subjects it to a trust; but as against him *personally*, it has no operation whatever, either *(a)* in the way of operating as a money judgment against him, or *(b)* as determining, against him personally, the questions involved in such trust proceeding, or *(c)*,—what is material here,—in adjudicating against him *any one of the features which may be essential to fixing him, where he can be found, with an affirmative liability* or to an *affirmative proposition of title*.

If this be not sound, then it is the law that, while the *final* step of declaring liability of a non-resident, upon a promissory note, for example, can be taken only where he can be found and served with process, nevertheless, any of the *essential elements* of his liability,—signature, consideration, standing of the plaintiff as endorsee, and the like,—can be established against him in his absence, *provided there be left open, for the forum in which he is found and served with process, the privilege of inquiring into the mere identity* of the defendant with the signer of the note, and the *mere conclusion of law of liability on his part*.

There is no such law. It is a fundamental principle that where a given tribunal or a given jurisdiction has no power to make an affirmative personal judgment against a given person, it has no power affirmatively to adjudicate, *as against him personally, any one essential feature* of such liability.

H. It is a general rule of jurisprudence that an ancillary suit must be brought in the same Court as the principal suit. The present suit is ancillary in this sense to the Minnesota suit of Rogers vs. Minneapolis Trust Co., Receiver, et al., and no Court except the State Court of Minnesota can entertain it.

The petitioner claims in opposition to the contentions above set forth, that the adjudication in Minnesota, in Rogers vs. Minneapolis Trust Company, Receiver, *et al.*, was binding upon the present defendants as to certain matters (relating mainly to the assets and indebtedness of the corporation) enumerated above. Under the present head, that claim may, for purposes of argument, be admitted. Assuming this point, two situations might in theory be presented. Those matters (of the assets and indebtedness of the corporation) might have been adjudicated in a suit brought solely for that purpose and terminating in a genuine *final* decree. The plaintiff might then proceed against non-resident stockholders, relying upon such final decree as to the matters so adjudicated by it. The considerations presented above go to show that such subsequent proceedings against stockholders would be inconsistent with general rules of law and with the Minnesota statutes. But that point need not be emphasized here, for the actual situation is a different one. The Minnesota suit of Rogers vs. Minneapolis Trust Company, Receiver,

et al., was not a suit merely for the adjudication of the questions of corporate assets and indebtedness, and did not proceed to a final decree. That the decree was not a final one appears from many considerations. For example, if fresh assets in Minnesota should turn up, as, for example, through the existence and enforcement of a claim hitherto unknown, for unpaid subscriptions of stock,—which would either satisfy or diminish the indebtedness,—such a situation would necessarily re-open the decrees as to stockholder's liability in the Rogers suit.

Other similar illustrations repeatedly suggest themselves. A suit like the present, therefore, lives from day to day only upon and by continuance of the situation in Minnesota. Outside of Minnesota, it floats upon the waves of Minnesota facts and pending Minnesota proceedings.

But a Minnesota decree which is thus open to fluctuation cannot be viewed as a final decree.

Again, the last paragraph of the decree (Record, p. 87) orders "that this Court retain jurisdiction of this cause until adjustment of all and several the rights and liabilities of the respective parties hereto." That is to say, whatever may be received this suit and in various other suits, will be turned over to the Hennepin District County Court of Minnesota to be dealt with and distributed there, and will not be paid over to any beneficial plaintiff by the Circuit Court below.

It is evident, therefore, that the present proceeding, as matters stand, is nothing but an ancillary proceeding to aid the Minnesota Court in carrying out its decree. Indeed, this is expressly admitted by the plaintiff himself in paragraph XV. of his bill (Record, p. 13, top). The bill says: "Your orators further aver * * * that said decree (Rogers vs. Minneapolis Trust Company *et al.*) cannot be executed without and beyond the limits of the jurisdiction of the State of Minnesota without the aid and interposition of equity in enforcing said decree in

or by *ancillary* proceedings." The prayer of the bill (Record, p. 13, middle) is *inter alia* "That this honorable Court will take jurisdiction of this *ancillary* Bill."

But it is a general principle of law that a proceeding purely ancillary to another proceeding, must be brought in the same court in which the main proceeding is pending. This principle finds its most familiar application in the rule that wherever a Federal Court has jurisdiction of an original proceeding, it has jurisdiction of any ancillary proceeding, regardless of the citizenship of the parties, and although if such ancillary proceeding were considered by itself it discloses no ground of federal jurisdiction. The cases to this effect are frequently rested on the ground that such ancillary proceedings *could not be brought in any other Court.* But the same principle is equally well established in the application of it sought here to be made. Thus in

I. Foster, Fed. Prac., (2nd Ed.), p. 43, (sec. 41),

after discussing the rule just cited, which gives Federal Courts jurisdiction of ancillary proceedings, of which, if such proceedings were not ancillary, they could not take jurisdiction, the author says:

> "Conversely there is a similar limitation upon the jurisdiction of the Federal Courts,"

and below on the same page,

> "proceedings supplementary to execution under a judgment of the State Court authorized by state statutes, against a debtor or, *or third persons*, cannot be instituted in or removed to the Federal Courts, although a creditor's bill may be."

The difference thus alluded to between such ancillary proceedings and a creditor's bill is obvious. It is the distinction between a suit by a judgment creditor upon a final judgment, obtained in a proceeding which has been entirely terminated by such judgment, and a suit to aid in carrying into effect a judgment not final, or

one which, though final in the ordinary sense, does not terminate the suit, because of statutory provisions for subsequent proceedings in the same court under such judgment. It has already been made clear that the present suit is not an ordinary suit by a judgment creditor upon a final judgment, but a suit purely ancillary to aid in executing a judgment of the Minnesota Court by no means final. The rule stated by the text writer above quoted is established by decisions of this Court and of the lower Federal Courts.

Bank vs. Turnbull, 16 Wall., 190.
Barrow vs. Hunton, 99 U. S., 80.
Pratt vs. Albright, 9 Fed., 634.
Buford vs. Strather, 10 Fed., 406.
Poole vs. Thatcherdeft, 19 Fed., 49.
Flash vs. Dillon, 22 Fed., 1.

There were some early cases which went much further than would now be sustained, in holding proceedings to be ancillary, though brought after final judgment in the first suit. But nothing has been found in the books to indicate any difference of opinion on the main proposition that a purely ancillary suit must be brought in the court having jurisdiction of the main suit. Nor has anything been found which furnishes any ground for pretending that the present suit is not an ancillary suit, within the meaning of the rule. The Federal cases naturally deal with the question originally as a question of the construction of the various judiciary acts, but it is evident from a study of the decisions that, at bottom, the doctrine is based upon the avoidance of such confusion and injustice as must result from the adjudication by separate tribunals having no common superior of questions arising in substantially the same controversy, that controversy being alive at the same time in both courts. Many questions of fact and law must necessarily be more or less involved both in the ancillary and in the original proceeding, and such questions would often be determined differently by different courts with great confusion and injustice as a

result. Whatever its basis, the doctrine clearly applies to the present case.

The case of Whitman vs. Oxford National Bank above cited, in no way conflicts with this doctrine, since in that case the original proceeding against the corporation was entirely concluded, and the suit in question was not ancillary, but independant.

It follows, then, that in the only aspect in which the present bill has any color of standing, and in the aspect in which it is expressly presented by the prayer of the bill, the Federal Courts, under a rule firmly established by many decisions, have no jurisdiction of the case, but such jurisdiction is exclusive in the Minnesota Court, in which the original suit of Rogers vs. Minneapolis Trust Company, Receiver, *et al.*, was brought. If that Court cannot do justice in the present case, the fault is in the Minnesota statutes, to be corrected by legislation of the nature of that which, as shown above, Minnesota has recently passed, and not by this Court.

III.

NO STANDING IN THE CIRCUIT COURT OF THIS PETITIONER AS "RECEIVER" OR OTHERWISE.

A. The Minnesota law recognizes no such "Receiver" as the petitioner claims to be; and his appoiatment is, therefore, void even in Minnesota.

There is no statute in Minnesota which even professes in the remotest way to deal with the question of appointing a Receiver to sue in behalf of creditors to enforce a stockholder's liability.

Minnesota Gen. Stats., 1878, Chapter 76, Sections 16–22.

Minnesota Gen. Stats., 1894, Sections 5904–5910.
Mohr vs. Minn. Elevator Co., 40 Minn., 343.
Willis vs. Mabon, 48 Minn., 14.
McKusick vs. Seymour, 48 Minn., 158.

In

Hale vs. Hardon, 95 Fed. Rep., 747, at page 771,

the majority opinion states that Minn. Gen. Stats. 1894, Section 5906, provides for the appointment of such a Receiver. That, however, is an error. That statute provision, as appears *by its own language* and *by its context*, is dealing with the assets *of the corporation* and not with the creditors' claims against stockholders. Its language is:

> "The Court shall proceed thereon as in other cases, and when necessary shall cause an account to be taken of the property and debts *to and from such corporation*, and shall appoint one or more receivers."

The Receivers thus provided for are patently Receivers of the property *of the corporation*, that is, such Receivers as the Minnesota Loan and Trust Company is, in the present matter.

Minnesota General Statutes 1878, Section 14 (Gen. Stats. 1894, Section 5902), provides:

> "A court in any stage of the proceedings may appoint one or more receivers to take charge of the property and effects *of such corporation* and collect and sue for and recover the debts and demands that are *due to*, and the property that *belongs to such corporation*."

This, too, only applies to assets *of the corporation*.

The petitioner is not a receiver who represents or stands in the place of the corporation. That position was already filled by the Minnesota Loan and Trust Company, the Insolvency Receiver.

The only other statutory provisions for the appointment of a Receiver are found in Minn. G. S., 1878, C. 66, Sect. 207 (G. S., 1894, Sect. 5351), as follows:

A receiver may be appointed

First. Before judgment on application of either party when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property or its rents and profits are in danger of being lost or materially injured or impaired, except in cases where judgment upon failure to answer may be had without application to the Court.

Second. After judgment to carry the judgment into effect.

Third. After judgment to dispose of the property according to the judgment or to preserve it during the pending of an appeal or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment.

Fourth. In the cases provided by law when a corporation has been dissolved or in insolvent or imminent danger of insolvency and has forfeited its right as in like cases of the property within the State of foreign corporations.

Fifth. In such cases as are now provided for by law or may be in accordance with the existing practice except as otherwise provided herein.

In

Hale vs. Hardon,

the Court cites

Hanson vs. Davison, 73 Minn., 454 (1898).

The facts in that suit were as follows:

The corporation in question made a voluntary assignment, and paid a dividend of 29 per cent.

Thereupon one of the creditors brought suit for himself and others, under Minn. Gen. Stats. 1878, Chapter

76 (Gen. Stats. 1894, Chapter 76), to enforce the stockholders' superadded liability. All the other creditors intervened (p. 458, line 4). Judgment had been rendered against the corporation "and all of its stockholders within the jurisdiction of the Court" (p. 458, line 10) in favor of each of the creditors (p. 458, line 12) for the amounts of their several respective claims as adjudged in that action. In that action, which is fully described in

Harper vs. Carroll, 66 Minn., 487,

it was held that the creditors were entitled to a judgment against each stockholder for the full amount of his superadded liability, even though the aggregate amount of judgment against the several stockholders exceeded the ultimate requirement of creditors; *but* that the judgment should provide for only partial satisfaction, or partial successive satisfactions, of the judgments, by execution, up to the amount ultimately actually required—an application of the ordinary rule of giving judgment for the full amount of a bond, and then liquidating the requirements through the execution.

It was laid down in

Harper vs. Carroll, page 494,

that the issue of the executions should so be dealt with—by the Court itself, and not by the Receiver or the Sheriff—as to produce in the end proper contribution among different stockholders, and to that end that the judgment should provide for retaining judicial control over the issue of executions.

The elaborate and complicated method of enforcing the judgment against the stockholders is shown by the tables and provisions in the supplementary opinion in that case (pp. 510–516).

A reading of the opinions in these two cases shows upon what principles, and for what purposes, among others, the Court undertook to appoint a Receiver in Harper vs. Carroll.

The appointment was made in mere conformity with general principles of equity jurisprudence, on the theory that a large number of several plaintiffs were maintaining, by leave of statute, a single action against a large number of persons, severally indebted to them severally, who were liable, severally, to certain maximum amounts, and were to be adjudged liable to those full amounts; who, however, in case the total aggregate amount should not be required, were to be subjected to *execution* only for a *percentage* of the several judgments against them, and were to have adjustment and contribution, and all equities, as between themselves, and as between them severally and the creditors severally; but the Receiver so appointed in Harper vs. Carroll was a Receiver *merely to hold such moneys as the Court, through its supervision of the executions, should decide to collect*, and to distribute them according to the order of the Court.

In

Hanson vs. Davison

this Receiver undertook to sue, in Minnesota, a stockholder who had been within the potential jurisdiction of Harper vs. Carroll, but had been overlooked and not joined as a defendant there. The Court held *that he had no right to sue*, but that the proper remedy against the defendant was to amend, or to file a supplementary bill, in Harper vs. Carroll, and to bring him into that suit.

Niether of these cases, therefore, gives the slightest color of support to the present plaintiff's theory, but on the contrary, taken together and separately, in so far as they deal with his right to sue, these cases are adverse to it.

This leaves the doctrine of receivership in Minnesota precisely where it stands by the general principles of equity jurisprudence; and those principles never included the proposition that a court in one jurisdiction could or would attempt to appoint, under the style of "receiver," a mere *representative plaintiff* for the courts of other jurisdictions.

It will be observed that the majority opinion in

Hale vs. Harden

entirely misconceives and misstates the law of Minnesota, and is entirely without support in its supposed discovery of a Minnesota doctrine of *receivership to sue out of the State*, for superadded liability of stockholders, as distinguished from the ordinary doctrine of receivership.

In this misapprehension of the Minnesota statutes and cases, and in this supposed discovery of receivership law peculiar to Minnesota, lies the fallacy of

Hale vs. Hardon.

It may be proper for this brief to suggest that the contentions made by the *defendant*, in

Hale vs. Hardon.

as to jurisdiction in Minnesota as against a foreign stockholder, to appoint a Receiver, and the discussion of the Court on that subject, were also based upon a misapprehension of the whole situation. This brief has no occasion to deny that a large number of creditors, each with a claim against each of a large number of persons, but under obligation to pool their collections, and hold them subject to equities, and with no power to collect severally *and efficiently*, can, in Minnesota or anywhere else, without making anybody a defendant, get a Receiver appointed to hold such collections as may lawfully be made in, or may come to, their State; nor that any other jurisdiction may appoint an Ancillary Receiver to take collections made (if such collections may properly be made) within its territory; nor that such creditors may go in a body, into different jurisdictions, in equity, to sue different alleged debtors, according to the proper procedure of such different jurisdictions, subject to power in the courts of these jurisdictions so to deal with the matter of judgment and execution (as is constantly done in interstate probate matters) as to make the result of all the proceedings work to a harmonious whole, with the

result that there shall not be taken from the stockholders, as a whole, more than enough to give the creditors a net 100 cents on the dollar in all, and that there shall be worked out proper contribution as between the different stockholders. That question, however, is not presented here.

The real question in

Hale vs. Hardon

was, not whether the Minnesota decree appointing a receiver was efficient *as against Hardon* (for Hardon had no concern with that), but whether the Minnesota receivership, admitting its validity for *some* purposes, was *intended to have*, or *could have* an extra-territorial operation, and therefore how the Receiver, without joining the creditors as plaintiffs, had any cause of action to sue in a foreign jurisdiction.

B. Even if the Appointment of the Present Plaintiff is Valid in Minnesota, He Has no Standing in this Court.

The term " Receiver " is commonly used to describe several classes of persons. It will be sufficient for the present purpose, however, to distinguish between such receivers on the one hand as acquire *title* in one form or another to the property or assets in question, and such receivers as do not acquire such title. Receivers of the first class can, of course, sue anywhere in relation to the property, relying not on their office as receiver, but on their title. So a receiver who has obtained a judgment, may sue on it simply as a judgment creditor. But receivers of the second and much more common class, who are receivers pure and simple and not *assignees* or *quasi-assignees*, are merely officers of the court which appoints them, and are technically without any standing whatever in the courts of other jurisdictions. It must be clear from what has already been shown, that if the present plaintiff has properly

any standing at all as receiver even in Minnesota, he is a receiver of the class last mentioned. As such he cannot, as of right, maintain any action or suit in connection with his receivership outside of Minnesota.

Booth vs. Clark, 17 How., 322, 331.
High, Receivers, Sect. 239.

It is true that by comity such a Receiver has sometimes been allowed to sue in a foreign State.

High, Receivers, Sect. 241.

But this privilege is granted with distinct recognition of the fact that it is a grant of a privilege, and in no way a recognition of a right; it rests entirely in the discretion of the Court; and it is not given when the Court for other reasons looks unfavorably upon the suit. The disposition of the United States Courts has always been against suits by such foreign receivers, and even were this not so, the present suit, in view of all the defects which have been pointed out, is hardly a proper occasion for granting by comity the privilege in question.

IV.

VARIOUS MISCELLANEOUS QUESTIONS, RELATING TO JURISDICTION AND OTHER MATTERS, PERTINENT TO ONE OR BOTH THE ABOVE-MENTIONED POSSIBLE ASPECTS OF THE BILL.

A. The creditors being the real plaintiffs, there is no diversity of citizenship, and therefore no Federal jurisdiction.

Under this head it becomes unimportant whether we treat the present plaintiff, assuming his appoint-

ment to be valid at all, as merely an officer of the Minnesota Court, or as an assignee of the *choses in action* which arise out of the liability of the stockholders. In any case the real plaintiffs are the creditors.

In Minnesota the claims of creditors against stockholders of corporations founded on the statutory or constitutional provisions, are claims enforcible only by the creditors themselves, but not by the corporation. The corporation cannot enforce the liability, for it is no part of the corporation assets, and not even the receiver for the corporation can enforce the liability.

Minn. Baseball Co. vs. City Bank, 66 Minn., 441 (1896).
Palmer vs. Bank of Zumbrota, 65 Minn., 90 (1896).
In re People's Live Stock Co., 56 Minn., 180 (1894).
International Trust Co. vs. American Loan & Trust Co., 62 Minn., 501 (1895).

The Receiver in this case is at most nothing more than an assignee of the claims of the creditors. If he is to be viewed as an assignee, the case seems, for purposes of Federal as against State jurisdiction, to come within the rule that there should be diversity of citizenship between the original creditors and the defendant.

According to the cases, it must affirmatively appear that the plaintiff's assignor could have brought suit on the contract if no assignment had been made.

Brock vs. North Western Fuel Co., 130 U. S., 341.
Shoecraft vs. Bloxham, 124 U. S., 730.

And see Act of March 3, 1875, U. S. Stat., 470, as amended by Act of March 3, 1887, U. S. Stat., 552 (Rev. Stat., Sect. 629).

This applies to an assignment by operation of law, such as an assignment in bankruptcy or a receivership. See

Sere vs. Pitot, 6 Cranch, 332,

to the effect that a suit brought by an assignee in insolvency of a trading company, composed of persons who were citizens of the same Territory as the defendants, could not be maintained in the Federal Courts.

And see Bradford vs. Jenks, 2 McLean, 130.

The term "assignee" covers not merely persons to whom is technically transferred the contract in controversy, but any one who by virtue of any transfer to him can claim an interest.

Plant Co. vs. R. R., 152 U. S., 71.
See Brook vs. Co,, 130 U. S., 341.
Shoecraft vs. Bloxham, 124 U. S., 730.

The doctrines of law above cited apply to assignees of contract rights.

Bushnell vs. Kennedy, 9 Wall, 387.
Shoecraft vs. Bloxham, 124 U. S., 730.
Mexican Nat. R. R. vs. Davidson, 157 U. S., 201.
Republic Iron Mining Co, vs. Jones, 37 Fed. Rep., 721.
Chase vs. Sheldon Roller Mills Co., 56 Fed. Rep., 625.
Simmons vs. Ysilanto Paper Co., 33 Fed. Rep., 193.

Also to suits on a judgment, and unless the assignor could have maintained the suit the assignee cannot do so.

Metcalf vs. Watertown, 128 U. S., 586.
Mississippi Mills vs. Cohn, 150 U. S., 202.

The jurisdiction is to be determined according to the status at the time the suit is brought and not at the time when the assignment is made or when any of the facts averred as a cause of action arose.

Jones vs. Shapera, 57 Fed. Rep., 457.

But if the plaintiff be regarded merely as a Receiver and in no sense as an assignee, it is even more plainly true that he has himself no substantial interest in the

controversy, but merely acts for and represents the creditors, and the citizenship of the creditors, as the real plaintiffs, must determine the jurisdiction.

The bill alleges the citizenship of the titular plaintiff, William E. Hale, so-called Receiver, as being in Minnesota, and that of all and several the defendants as being in Pennsylvania, with residence in the Eastern District of said State; but there is, strictly speaking, no allegation in the bill of the citizenship of the creditors. It appears, however, from the lists of creditors in the Minnesota records attached to the bill, that some of the creditors are residents of Pennsylvania. It follows that there are substantial plaintiffs of the same citizenship as the defendants, in which case there is, of course, no Federal jurisdiction.

Hoe vs. Jameson, 166 U. S., 395.
Smith vs. Lyon, 133 U. S., 315.

B. Lack of allegations sufficient to show that the conditions of statutory liability exist.

Under this head the bill will be considered in the second aspect above discussed (as a bill auxiliary to the Minnesota suit), but all question as to what matters should be adjudicated in the general suit, and what, if any, may be left to be determined in subsequent distinct suits, will for the moment be waived. There are a number of matters, essential to the liability of these defendants, and which must therefore be established in *some* suit before these defendants can be held, which are not in any way alleged in the bill, and which do not appear ever to have been adjudicated in any other suit. As the bill discloses nothing on these essential matters, it has no equity.

The matters thus omitted are as follows:

(1) The constitutional and statutory liability imposed on stockholders for debts of the corporation in-

cludes only contract indebtedness. There is no liability for debts incurred on account of torts.

Dodge vs. Minn. Plastic State Roofing Co., 16 Minn., 368 (1871).
Cook on Stock & Stockholders (3d Ed. 1894, Sec. 217).
Morawetz on Corporations, Secs. 880, 886, and
Childs vs. Boston Iron Works, 137 Mass., 516 (1884).

The bill, paragraph IV. (Record, p. 8), refers to "sundry indebtedness to divers persons and bodies corporate, which said indebtedness aggregated on said 20th day of May, 1893, upwards of three million dollars, all whereof was evidenced by debentures, guaranteed notes and obligations and other certificates of indebtedness issued in the regular course of business as aforesaid, and all whereof, on said last-mentioned date, constituted legal valid and subsisting indebtedness against said corporation."

And in paragraph XII. (Record, p. 12) the bill refers to "the aggregate valid and subsisting indebtedness."

It is not made to appear how the alleged indebtedness arose, or the nature or description of it or any part of it, or whether the same arose in contract or tort, or that it did not include indebtedness for torts.

It does not appear in any way that the indebtedness was of such a nature as to affect any stockholder with liability.

It does not appear that the judgment of the court described in the first subdivision of paragraph VIII. of the bill (Record, p. 9) did not include forms of indebtedness for which the defendant as a stockholder would not have been liable.

(2) Article 4 of the Articles of Incorporation of the Northwestern Guaranty Loan Co. (Record, p. 21, last paragraph) provides that "the highest amount of indebtedness or liability to which said corporation

shall at any time be subject * * * shall be three-fourths of the paid-in capital stock," excluding certain forms of indebtedness.

The provision regarding stockholders' liability for debts or a corporation in Article X., Sect. 3, of the Constitution of Minnesota (above quoted) is as follows: "Each stockholder in any corporation * * * shall be liable to the amount of stock held or owned by him."

There is no statute extending or in any way amplifying this liability.

See Mohr vs. Minnesota Elevator Co., 40 Minn., 343 (1889):—

> "The obligation relied upon as still resting upon the defendant stockholder is the creature of the Constitution and has no existence at common law. The responsibility of the stockholders is determined by the fundamental law when they became stockholders. *They then agree to become liable both in a corporate capacity and individually to all who shall give credit to the corporation.*"

Such being the liability it is clearly only a liability for *legal debts* of the corporation.

By the Articles of Association here all persons dealing with the corporation were bound to take notice of the debt limit, and that any debt greater than that set forth in the articles was *ultra vires* and illegal.

"It is a settled rule that a person who deals with a corporation must at his peril take notice of its charter or articles of association," and debts incurred or contracts made contrary to express mandates of the charter are absolutely void.

If a corporation has authority to borrow to a certain amount only it will not be liable upon a loan made in excess of that amount to a party who had notice that the borrowing powers of the company were exhausted.

Morawetz on Corporations, Sect. 591, 600, 657, 686, 687, and 695.

In

Oswald vs. Minneapolis Times Co., 65 Minn. 249 (1896.)

where it was claimed that the debts were contracted beyond the debt limit, the Court said that "conceding without deciding that the defense would be available" there was no proof of it.

It is not made to appear in the declaration in the present case (1) that under the constitution and laws of Minnesota these defendants are or were liable for any debts of the corporation contracted in excess of a debt limit fixed by its articles of incorporation at the time or times of their becoming the owners of shares of stock or at the date of the arising of the respective debts; (2) or at what time or times the defendants became the owner of their several alleged shares of stock; (3) or what was the limit of indebtedness then fixed by the articles of incorporation; (4) or when the alleged indebtedness of the corporation or the several debts composing the same arose; (5) or but that the alleged indebtedness of the corporation mentioned in the declaration was in excess of the lawful indebtedness which the corporation was by law authorized from time to time to incur; or but that such excess of lawful indebtedness was known to creditors; (6) or if so in excess, to what extent; (7) or what particular debt were incurred in excess of such limit; (8) or when they were incurred.

(3) The allegations in the bill, in paragraph IV. and paragraph XII., regarding the indebtedness of the corporation, nowhere state whether (1) it was not in part or fully secured (2) or what the securities were (3) or by whom held (4) or for what particular debts.

In fact, in paragraph IV. it is stated that the indebtedness is evidenced by "debentures and guarantee notes" so that there is no clear allegation anywhere that there was any existing net indebtedness over the value of corporate assets *and securities.*

(4) The amendment to Article 4 of the articles of incorporation (Record, p. 21), excludes from the indebtedness which has a fixed limit, "its contingent liability of guaranty," and "debentures issued by or other obligations, * * * the payment of which is secured by real estate mortgage or other securities," and "payments made to it to meet unmatured obligations due to the corporation."

The corporate indebtedness for which the petitioner is trying to charge the defendants is, on the facts alleged in his bill (see paragraph XII. and paragraph IV. in excess of the debt limit (Record, p. 21, bottom).

The petitioner does not allege, however, that such excess or any part thereof, is within the exceptions above referred to of debts excluded.

(5) It is not made to appear but that some part of the stock issued by said corporation has not been paid in in full, and if so whether any, and if so what steps have been taken to enforce payment therefor.

By the provisions of G. S. 1894 Minn., Sections 2600, 2796, stockholders are liable for all upaid instalments on stock, and provisions is made for the enforcement of this liability in Sections 2601, 2602, and also Sections 5905–5910 (G. S. 1878, C. 76, Sections 16–22).

When the corporation has been adjudicated insolvent, or when all its property has been sequestrated the proper party to enforce the liability of stock, holders to pay up their stock subscriptions is the Receiver of the corporation or the assignee in insolvency (not the alleged Receiver appointed in the proceedings mentioned on paragraph VIII. of the bill), such unpaid subscriptions being part of the assets of the corporation.

Spooner vs. Bay S. Louis Syndicate, 47 Minn., 464, 1891.

Minn Thresher Mfg. Co. vs. Langdon, 44 Minn., 37 (1890).

Merchants Nat. Bk. vs. N. W. Mfg. Car Co., 48 Minn., 361 (1892).

St. Louis Car Co. vs. Stillwater Street Ry. Co., 53 Minn., 129 (1893).
In re People's Live Stock Co., 56 Minn., 180 (1894).
Spilman vs. Mendenhall, 57 N. W. Rep., 468 (1894).

It has also been held that where insolvency proceedings are pending, and an assignee acting, there may be no occasion for a Receiver to be appointed to enforce the constitutional liability of stockholders. All the methods to collect *corporate assets* must first be exhausted before resort is had to the constitutional liability of stockholders.

"In any action under G. S., C. 76, the corporate assets must be sequestrated and exhausted before resort can be had to stockholders to pay the deficiency."

"These stockholders can only be adjudged liable when * * * the corporation itself is found unable to liquidate the indebtedness."

Mohr vs. Minn. Elevator Co., 40 Minn., 343.
Minneapolis Paper Co. vs. Swinburne Printing Co., 66 Minn., 378 (1893).
See Walter vs. Seven Corners Bank, 58 Minn., 434 (1894).
International Trust Co. vs. Amer. Loan & Trust Co., 62 Minn., 501 (1895).

This constitutional liability on shares of stock is only "to pay an amount equal to their face value *if necessary*."

Holland vs. Duluth Co., 65 Minn., 324 (1896).

The plaintiff therefore must aver that all corporate assets have been exhausted and applied to the payment of debts before he can enforce the stockholders' liability; and there is no averment in the declaration that this is so or that any steps have been taken to enforce payment of unpaid subscriptions.

(6) It is not made to appear that the defendants

had notice of the presentation of the claims of the creditors who became parties to the action in the District Court of Hennepin County subsequent to the plaintiff in that suit as alleged in the last clause of paragraph 8 of the declaration.

A defendant stockholder in a suit brought to enforce, not a liability of the corporation, but a liability to creditors, is entitled, to notice of the presentation of the claim of every creditor who subsequently becomes a party to the action.

Spooner vs. Bay St. Louis Syndicate, 47 Minn., 464 (1891).

SUMMARY.

The considerations which have been presented in this brief, as considerations believed to be fatal to the success of the present suit, may be summed up,—with a less elaborate classification than that adopted for their exposition,—as follows :

I. The suit cannot be maintained as a suit upon a binding personal judgment

A. Because there was no legal way in which the Minnesota judgments in Rogers vs. Minneapolis Trust Co., Receiver, et al., could be made binding on the present defendants as to their personal liability.

B. Because there was no attempt in that suit so to bind them, and no claim in the bill that they were so bound, in that or any other suit.

II. The suit cannot be maintained as a suit relying on the adjudication in the Minnesota proceedings of certain material questions, in a manner binding upon the present

defendants, and seeking to determine in the United States Circuit Court the remaining questions necessary to establish the personal liability of the present defendants.

A. Because on general principles of law, affirmed and adopted by competent statutes in Minnesota, such personal liability could properly be established only in a single omnibus proceeding or series of proceedings in the home forum, to which all interested persons should be parties, and in which all material questions should be determined.

B. Because the present suit departs from the form of remedy provided by the Minnesota statutes, which form of remedy is exclusive.

C. Because, even if the question of personal liability need not be determined in the omnibus suit, all material questions relating to the debts and assets of the corporation must be so determined, and in a manner affirmatively binding upon all stockholders; and these requirements have not been met in the present instance.

D. Because the present suit is clearly a proceeding merely ancillary to the Minnesota suit of Rogers vs. Minneapolis Trust Co., Receiver, et al., and can, therefore, be maintained only in the same court in which that principal suit is still kept alive.

III. The present plaintiff has no standing in this Court.

A. Because there was at the time of his appointment no provision of Minnesota law under which such an alleged Receiver could be validly appointed.

B. Because, even if his appointment were valid in Minnesota, he has no title to any property in question, and therefore could sue outside of the Minnesota courts only by comity; and the present

suit presents no occasion for the exercise of such comity.

IV. The Federal Courts have no jurisdiction of the present case, because the creditors are the real plaintiffs, and in the light of that fact, there is not the requisite diversity of citizenship.

V. Whatever may be the form of proceeding by which the liability of stockholders in Minnesota corporations should properly be enforced, certain matters essential to the liability of the defendants are not alleged in the bill, and do not appear ever to have been adjudicated anywhere.

Respectfully submitted by
HEMAN W. CHAPLIN.